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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Shaine Carl Cagle,
Petitioner,
vs.
Charles L. Ryan; et al.,
Respondents.

No. CV 16-111-TUC-DCB (LAB)

REPORT AND RECOMMENDATION

Pending before the court is a second amended petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, filed on July 7, 2016, by Shaine Carl Cagle, an inmate confined in the Arizona State Prison Complex in Florence, Arizona. (Doc. 33)

Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Bowman for report and recommendation.

The Magistrate Judge recommends the District Court, after its independent review of the record, enter an order denying the petition. Cagle's claims are procedurally defaulted.

Summary of the Case

Cagle was shopping at Wal-Mart when he carried his items past the cashiers and headed toward the exit. (Doc. 46, pp. 10-11) When Wal-Mart personnel tried to stop him from leaving, he threatened them with a knife. *Id.* After his arrest, police located Cagle's vehicle in the parking lot. (Doc. 46, pp. 5-6) They found firearms in the vehicle, and Cagle was charged with being a prohibited possessor in addition to armed robbery and aggravated assault. *Id.*; (Doc. 43, pp. 3-4)

1 Cagle pleaded guilty, pursuant to a plea agreement, to one count of armed robbery. (Doc.
2 43-6, p. 3) He was sentenced to a 5-year term of incarceration. *Id.*

3 On May 28, 2014, Cagle filed notice of post-conviction relief, but counsel was unable
4 to find any meritorious issues. (Doc. 44, pp. 3, 10) He filed a petition pro se on January 17,
5 2013. (Doc. 16-1, p. 11) In that petition, Cagle asserted in 18 claims why he was entitled to
6 relief. (Doc. 44-3, pp. 2-5); (Doc. 45, pp. 5-18) The trial court denied the petition ruling,
7 among other things, that Cagle “voluntarily, knowingly, and intelligently enter[ed] into the plea
8 agreement.” (Doc. 46, pp. 13-18) The court further found trial counsel was not ineffective for
9 failing to evaluate his mental competency. *Id.*

10 Cagle filed a petition for review on August 31, 2015, in which he presented 22 issues for
11 review. (Doc. 47, pp. 3-14) The Arizona Court of Appeals granted review but denied relief
12 on December 1, 2015. (Doc. 48, p. 20) The court found Cagle’s issues were waived because
13 “he presents no meaningful arguments and, for many of his claims, instead seeks to incorporate
14 by reference his petition for post-conviction relief.” (Doc. 48, p. 21) The court further
15 explained, “That procedure is not permitted by our rules.” *Id.* In the alternative, the court found
16 that the trial court “correctly rejected Cagle’s claims in a thorough and well-reasoned minute
17 entry, which we accordingly adopt.” (Doc. 48, p. 22)

18 On February 26, 2016, Cagle filed a petition for writ of habeas corpus in this court. (Doc
19 1) He filed an amended petition on May 5, 2016. (Doc. 26) He filed the pending second
20 amended petition on July 7, 2016. (Doc. 33) He raises nine claims: (1) competency, (2)
21 ineffective assistance of counsel, (3) prosecutorial misconduct, (4) conflict of interest, (5) abuse
22 of discretion, (6) judicial bias, (7) structural/plain/fundamental errors, (8) presentence report,
23 (9) cumulative errors. (Doc. 33, pp. 1-37) Cagle asserts he raised all of his claims before the
24 Arizona Court of Appeals.¹ *Id.*

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27 ¹ Cagle’s initial petition was written on the court supplied habeas petition form. (Doc. 1) The
28 second amended petition was written freehand but employs the same structure for each Ground: “(a)
Supporting FACTS . . . (b) Did you present the issue raised in [this Ground] to the Arizona Court of
Appeals? Yes/No; (c) If yes, did you present the issue in a: Direct appeal, First petition, Second

1 In their answer, the respondents argue Cagle's claims are waived or procedurally
 2 defaulted. (Doc. 42) In the alternative, the respondents argue Cagle's claims should be denied
 3 on the merits. *Id.*

4 The respondents are correct. Cagle failed to properly exhaust his issues below. They
 5 are procedurally defaulted. The court does not reach the respondents' alternate arguments.

6 7 Discussion

8 The writ of habeas corpus affords relief to persons in custody in violation of the
 9 Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). If the petitioner is
 10 in custody pursuant to the judgment of a state court, the writ will not be granted unless prior
 11 adjudication of the claim –

12 (1) resulted in a decision that was contrary to, or involved an unreasonable
 13 application of, clearly established Federal law, as determined by the Supreme
 Court of the United States; or

14 (2) resulted in a decision that was based on an unreasonable determination of the
 facts in light of the evidence presented in the State court proceeding.

15 28 U.S.C. § 2254(d). The petitioner must shoulder an additional burden if the state court
 16 considered the issues and made findings of fact.

17 In a proceeding instituted by an application for a writ of habeas corpus by a
 18 person in custody pursuant to the judgment of a State court, a determination of
 19 a factual issue made by a State court shall be presumed to be correct. The
 applicant shall have the burden of rebutting the presumption of correctness by
 clear and convincing evidence.

20 28 U.S.C.A. § 2254 (e)(1).

21 “[The] standard is intentionally difficult to meet.” *Woods v. Donald*, 135 S.Ct. 1372,
 22 1376 (2015). “[C]learly established Federal law’ for purposes of § 2254(d)(1) includes only
 23 the holdings, as opposed to the dicta, of th[e] Court’s decisions.” *Id.*

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 26 petition, [or] Third petition; (d) If you did not present the issue in [this Ground] to the Arizona Court
 of Appeals, explain why; (e) Did you present the issue in [this Ground] to the Arizona Supreme Court?
 27 Yes/No.” *Id.* For each Ground, except for Ground 3, Cagle answers “(b) Yes; (c) First Petition; (d)
 NA; (e) No.” (Doc. 33) For Ground 3, Cagle answers “(b) Yes; (c) First Petition; (e) No” omitting
 28 entry (d) NA. *Id.*

1 A decision is “contrary to” Supreme Court precedent if that Court already confronted
2 “the specific question presented in this case” and reached a different result. *Woods*, 135 S.Ct.
3 at 1377. A decision is an “unreasonable application of” Supreme Court precedent only if it is
4 “objectively unreasonable, not merely wrong; even clear error will not suffice.” *Id.* at 1376.
5 “To satisfy this high bar, a habeas petitioner is required to show that the state court’s ruling on
6 the claim being presented in federal court was so lacking in justification that there was an error
7 well understood and comprehended in existing law beyond any possibility for fairminded
8 disagreement.” *Id.* (punctuation modified).

9 If the highest state court fails to explain its decision, this court looks to the last reasoned
10 state court decision. *See Brown v. Palmateer*, 379 F.3d 1089, 1092 (9th Cir. 2004).

11 Federal habeas review is limited to those issues that have been fully presented to the state
12 court. This so-called “exhaustion rule” reads in pertinent part as follows:

13 An application for a writ of habeas corpus on behalf of a person in custody
14 pursuant to the judgment of a State court shall not be granted unless it appears
15 that – (A) the applicant has exhausted the remedies available in the courts of the
16 State. . . .

17 28 U.S.C. § 2254(b)(1)(A).

18 To be properly exhausted, the federal claim must be “fairly presented” to the state courts.
19 *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008). “Fair presentation requires that the
20 petitioner describe in the state proceedings both the operative facts and the federal legal theory
21 on which his claim is based so that the state courts have a fair opportunity to apply controlling
22 legal principles to the facts bearing upon his constitutional claim.” *Id.* (punctuation modified)

23 The petitioner must explicitly alert the state court that he is raising a *federal*
24 constitutional claim. The petitioner must make the federal basis of the claim explicit either by
25 citing specific provisions of federal law or federal case law, even if the federal basis of a claim
26 is “self-evident,” *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), *cert. denied*, 528 U.S.
27 1087 (2000), or by citing state cases that explicitly analyze the same federal constitutional
28 claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

1 If the petitioner is in custody pursuant to a judgment imposed by the State of Arizona and
2 did not receive a capital sentence, he must present his claims to the Arizona Court of Appeals
3 for review. *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir. 2005), *cert. denied*, 546 U.S. 818
4 (2005); *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999), *cert. denied*, 529 U.S. 1124 (2000).
5 If state remedies have not been exhausted, the petition may not be granted and ordinarily should
6 be dismissed. *See Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). In the alternative, the
7 court has the authority to deny on the merits rather than dismiss for failure to exhaust. 28
8 U.S.C. § 2254(b)(2).

9 A claim is “procedurally defaulted” if the state court declined to address the issue on the
10 merits for procedural reasons. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002).
11 Procedural default also occurs if the claim was not presented to the state courts, and it is clear
12 the state would now refuse to address the merits of the claim for procedural reasons. *Id.*

13 Procedural default may be excused if the petitioner can “demonstrate cause for the
14 default and actual prejudice as a result of the alleged violation of federal law, or demonstrate
15 that failure to consider the claims will result in a fundamental miscarriage of justice.” *Boyd v.*
16 *Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998). A fundamental miscarriage of justice results
17 “where a constitutional violation has probably resulted in the conviction of one who is actually
18 innocent.” *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649 (1986).

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20 Discussion

21 Cagle states that he presented all of his claims to the Arizona Court of Appeals. (Doc.
22 33) Assuming he did so, all of his claims are procedurally defaulted. *See Franklin v. Johnson*,
23 290 F.3d 1223, 1230 (9th Cir. 2002).

24 The Arizona Court of Appeals found that all of the claims Cagle raised in his petition for
25 review were waived stating as follows:

26 [H]e presents no meaningful arguments and, for many of his claims, instead seeks
27 to incorporate by reference his petition for post-conviction relief. That procedure
28 is not permitted by our rules. Nor do we address claims unsupported by relevant
authority and meaningful argument.

(Doc. 48, p. 21) (internal citation omitted) The court cited *State v. Stefanovich*, 232 Ariz. 154, 158, 302 P.3d 679, 683 (App. 2013), which cites to Ariz.R.Crim.P. 32.9(c)(1)(iv). *See Wood v. Ryan*, 693 F.3d 1104, 1117 (9th Cir. 2012) (“Arizona law requires that a petitioner present the issues and material facts supporting a claim in a petition for review and prohibits raising an issue through incorporation of any document by reference, except for appendices.”); *see also State v. Moore*, 125 Ariz. 528, 529, 611 P.2d 115, 116 (App. 1980) (“[Rule 32] was not written with the purpose of enabling criminal defendants, after conviction and appeal, to ‘shotgun’ issues in the outside hope that a court might find some error in the case.”). Cagle’s claims are therefore procedurally defaulted. *See Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002); *see, e.g., Cabrera-Somosa v. Ryan*, CV 14-1202-PHX-SRB, 2014 WL 5488980, at *13 (D. Ariz. 2014), report and recommendation adopted, CV-14-01202-PHX-SRB, 2014 WL 7272473 (D. Ariz. 2014) (Petitioner’s claims were procedurally defaulted because the Arizona Court of Appeals denied review for failing to comply with Ariz.R.Crim.P.32.9(c)(1).).

The Arizona Court of Appeals went on to state as follows: “In any event, we have reviewed Cagle’s petition below, the record, and the trial court’s ruling and conclude the court correctly rejected Cagle’s claims in a thorough and well-reasoned minute entry, which we accordingly adopt.” (Doc. 48, p. 22) This alternate holding, on the merits, does not vitiate the court’s procedural bar. *Harris v. Reed*, 489 U.S. 255, 264 n. 10 (1989); *Zapata v. Vasquez*, 788 F.3d 1106, 1112 (9th Cir. 2015).

Cagle did not file a reply arguing his procedural default should be excused.

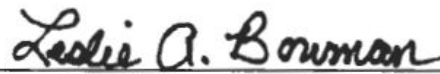
RECOMMENDATION

The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order DENYING the petition for writ of habeas corpus. (Doc. 1) All issues are procedurally defaulted.

Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within 14 days of being served with a copy of this report and recommendation. If objections are not

1 timely filed, they may be deemed waived. A Response to an objection is allowed, but a Reply
2 to a Response is not allowed without permission from the District Court.

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4 DATED this 18th day of January, 2017.

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7 Leslie A. Bowman
8 United States Magistrate Judge
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